

NO. 44366-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRIAN HUMES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank E. Cuthbertson, Judge

REPLY BRIEF OF APPELLANT

JARED B. STEED
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY¹

THE TRIAL COURT VIOLATED HUMES' RIGHT TO A PUBLIC TRIAL BY TAKING PEREMPTORY CHALLENGES IN PRIVATE.

The trial court took peremptory challenges of prospective jurors at sidebar. 5RP 78-79. Humes contends, for reasons set forth more fully in the opening brief, that because exercising peremptory challenges is part of voir dire, and because the trial court failed to apply the Bone-Club² factors, the court violated Humes' constitutional right to a public trial. Brief of Appellant (BOA) at 15-25. The State maintains the trial court did not violate Humes' right to a public trial. Supplemental Brief of Respondent (SBOR) at 1-16. For the following reasons, Humes asks this Court to reject the State's arguments.

The public trial right attaches to a jury selection proceeding involving the taking of peremptory challenges as well as challenges for cause. State v. Wilson, 174 Wn. App. 328, 342, 298 P.3d 148 (2013). Nonetheless, the State argues Humes must establish the public's right to see and hear the exercise of peremptory challenges with the "experience and logic" test discussed in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715

¹ The State's arguments regarding the ineffective assistance of trial counsel have been anticipated and sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

² State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

(2012). SBOR, at 11-16. As discussed fully in the opening brief, even under the “experience and logic” test, the secret ballot method of exercising peremptory jurors in Humes’ case implicated his right to a public trial and constituted an unlawful closure. BOA at 16-21.

The State further contends that Humes’ challenge to violation of his public trial right cannot be raised for the first time on appeal. SBOR at 4-7. This argument is without merit. Washington courts have repeatedly held that violations of the right to public trial can be raised for the first time on appeal. State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 173 n.2, 137 P.3d 825 (2006); State v. Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004); State v. Duckett, 141 Wn. App. 797, 805-06, 173 P.3d 948 (2007).

The trial court did not consider the Bone-Club factors before conducting the private jury selection process at issue here. The error violated Humes’ public trial right, which requires automatic reversal because it affects the framework within which the trial proceeds. State v. Wise, 176 Wn.2d 1, 6, 13-14, 288 P.3d 1113 (2012).

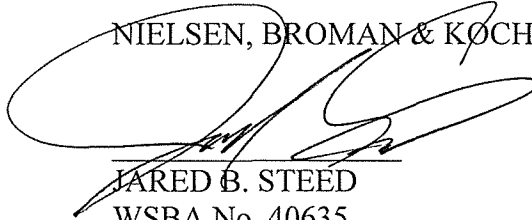
B. CONCLUSION

For the reasons discussed above and in the opening brief, this Court should reverse Humes' conviction and remand for a new trial.

DATED this 3rd day of April, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, likely belonging to Jared B. Steed, is written over the firm name and the name of the attorney.

JARED B. STEED

WSBA No. 40635

Office ID No. 91051

Attorneys for Appellant

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.) COA NO. 44366-0-II
)
 BRIAN HUMES,)
)
 Appellant.)

X Patrick Mayronsky

NIELSEN, BROMAN & KOCH, PLLC

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